STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SMITH, Minors.

UNPUBLISHED
June 24, 2014

Nos. 319099 & 319102
Oakland Circuit Court
Family Division
LC No. 12-800168-NA

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the trial court order terminating their parental rights over their minor children, C. Smith and S. Smith, under MCL 712A.19b(3)(b)(*ii*) (parent had opportunity to prevent abuse but failed to do so) and (3)(g) (failure to provide proper care and custody). We affirm.

The sole issue in these appeals is whether the trial court clearly erred by finding termination of respondents' parental rights was in the children's best interests. This Court reviews the trial court's factual findings on an appeal from an order terminating parental rights for clear error. MCR 3.977(K). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). "When reviewing the trial court's findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

Once a ground for termination is established, the court must order termination of parental rights if the court finds that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). To make that determination, "the court may consider the child's bond to the parent[;] the parent's parenting ability[;] the child's need for permanency, stability, and finality[;] and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 41-42; 823 NW2d 144 (2012) (citations omitted). Further, unlike the clear and convincing burden of proof associated with establishing whether any statutory ground exists for terminating parental rights, a petitioner need only establish that termination is in the child's best interests by a preponderance of the evidence. *In re Moss*, 301 Mich App at 80, 90.

I. DOCKET NO. 319099

On appeal, respondent mother raises challenges based on each of the *Olive/Metts* factors.

First, she claims that the trial court failed to give adequate weight to the "strong bond" between her and the children. However, this argument ignores that other considerations may outweigh the bond between a parent and child, especially where termination will help the children achieve "stability and permanence." *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008). Here, while the trial court acknowledged respondent mother's bond with C. Smith and was uncertain of her bond with S. Smith, achieving stability and permanence were only the tip of the iceberg in the court's decision to terminate respondent mother's rights.

As for S. Smith, the court was clear that respondent mother had failed to provide stability and permanence given that, over "a short term basis, [S. Smith] had lived at several different hotels, with at least two different relatives and in multiple apartments/homes." To this, the court added that S. Smith had suffered multiple fractures at different times, was subject to respondent mother's mood swings and her physical abuse, including "screaming, punching and attempts to toughen her up." The court highlighted its concern that this abuse would persist given that respondent mother denied her own confession that she had inflicted this abuse, and that since their placement in foster care, both children had improved. Also relevant were the results of respondent mother's Psychological Evaluation, which revealed that she acts impulsively, does not recognize the magnitude of her responses, has a host of mental illnesses (including adjustment disorder, PTSD, Schizoaffective disorder, and hallucinations), complies inconsistently with her medication, and that she presents a high risk of harm to the children. The record confirms every one of these findings.

With respect to C. Smith, the court found that she, too, lacked the requisite stability, was abused physically when respondent mother would "pop" her with a spoon or belt, and had witnessed respondent mother's more drastic physical and emotional abuse of S. Smith. Again, the record confirms these findings.[1] In view of this, the trial court did not clearly err in weighing respondent mother's bond with the children.

Second, respondent mother claims that her improvement as a parent should have trumped the court's decision to terminate her rights. However, while evidence was presented that respondent mother had completed parenting classes and that her supervised visits with the children had improved, the children were otherwise "thriving" in foster care while away from respondent mother's physical and emotional abuse that *respondent mother denied inflicting at trial despite her prior admissions to the contrary*. These severe additional circumstances clearly support the court's holding that the parenting and anger management classes were of little benefit to the children and that respondent mother may relapse into her "old habits." See *In re Fried*, 266 Mich App at 543-544 (stating that the parent's improvement in supervised visitation was insufficient to avoid termination of parental rights where the child was "flourishing" in another's care and the parent was otherwise unprepared to care for the child). And, on a related note,

[1] Although the court noted in passing this case was arguably one of "anticipatory neglect," this was not the basis of its holding with respect to C. Smith.

respondent mother continues to battle a legion of mental health issues and relies on respondent father to provide her constant care in that regard. As the court found, the risk of harm, both physical and emotional, is of paramount concern, and any improvement in parenting ability respondent mother displayed does not overcome the ongoing danger her behavior presents to the children.

Nor may respondent mother blame the Department of Human Services (DHS) for failing to provide her proper services sooner in this process. For starters, respondent mother cites to nothing in the record to support her bald accusations that "there was a breakdown in services, a turn-over in workers, a lack of referrals and re-referrals." This alone is insufficient to carry her argument. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). But even if DHS had provided additional services, there is no evidence that respondent mother would have complied. On this score, it is unknown whether respondent mother even enrolled in the parenting classes offered in Child Protective Services' (CPS's) first investigation, and she still displayed aggressive and violent behavior even after participating in the services offered by Families First. In light of this, it is difficult to see how additional services would have changed anything.

Third, respondent mother claims that the court disproportionately emphasized the denial of her confession to police because she "may have been in an untreated state of mind." However, not a shred of evidence exists to support this speculative claim. Moreover, a review of the confession reveals that respondent mother spoke cogently and suffered from no "blackouts," which was the condition respondent mother attributed to causing her memory loss. By the same token, the record is devoid of any evidence that her confession to police was coerced or otherwise false. While respondent mother maintains that her sixth-grade reading level affected the reliability of her interview, the recording of her confession shows that she had no problem understanding the questions and providing in depth explanations. Again, the court did not clearly err.

Respondent mother urges us to import the criminal doctrine of *corpus delicti* and require corroboration of her confession. See *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006) ("The *corpus delicti* rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence."). But even setting aside that respondent mother cites no authority applying this doctrine in this context, her claim ignores evidence that S. Smith sustained serious injuries and that these injuries were consistent with abuse. Thus, the *corpus delicti* doctrine is not applicable.

Finally, respondent mother contends that her improved parenting skills are the reason for the children's improvement rather than their placement in foster care, which is temporary. But in making this argument, respondent mother just recycles her claim that she has a bond with the children and has improved parenting skills. Regardless of those meritless justifications, it is difficult to conceive that the children's improvement is attributable to their limited, hourly exposure to respondent mother once a week rather than their placement in foster care, where they are no longer exposed to routine physical and emotional abuse, let alone complications from respondent mother's mental illnesses. Moreover, the fact that foster care may be temporary

hardly weighs in respondent mother's favor, where she is wholly dependent on respondent father and government assistance for maintaining respondents' apartment and is otherwise unemployed.

II. DOCKET NO. 319102

Like his wife, respondent father also frames his appeal using the *Olive/Metts* framework.

First, he claims that termination was not in the children's best interests in light of his bond with them. As with respondent mother, this argument fails for its failure to consider the whole picture. *In re LE*, 278 Mich App at 29-30. Indeed, besides the stability the children are experiencing in foster care, respondent father has minimized both his and respondent mother's involvement in S. Smith's multiple injuries. He has no concern about respondent mother's parenting abilities and maintains that he left the hospital with S. Smith because he did not like how the staff treated him. Worse, despite his awareness of respondent mother's confession, in which she admitted physically abusing both children, he continues to believe respondent mother would be a good caregiver and that both children would be safe with her. In fact, he testified that while his children are very important to him, he would only divorce respondent mother if ordered to do so by the court. These facts easily support the court's conclusion that despite any potential bond, respondent father lacks the good judgment appropriate to care for young children.

Second, respondent father challenges the court's reliance on the opinions of the CPS worker, the current foster care worker, and the court clinical psychologist. But in making these challenges, respondent father concedes that the allegations in the amended petition, which include his inability to establish stable housing and employment as well as his minimization of respondent mother's behavioral problems, "reflect poorly" on his parenting ability. These are not insignificant facts.

Indeed, the amended petition – to which both respondents pleaded no contest – not only provided that the cause of S. Smith's serious injuries was nonaccidental trauma inconsistent with respondent father's explanation, but also provided that respondent father fled the hospital after learning that CPS would be notified as a result of the nature of the injuries. The doctor indicated that the injuries were consistent with abuse and was surprised S. Smith survived them, given their severity. Yet, despite his knowledge of respondent mother's confession and evidence that respondent father was present when the injuries were inflicted, respondent father claimed ignorance as to how S. Smith sustained these injuries and, as noted, continued to believe the children would be safe in respondent mother's care.[2] Further, respondents' consistent moves and unstable employment did not provide a stable environment.

In the face of this evidence, respondent father claims that the court should have disregarded the CPS worker's testimony because she was not the current foster care worker and,

[2] As previously noted, the trial court did not premise its opinion concerning C. Smith on the doctrine of anticipatory neglect as respondent father argues. Regardless, given respondent mother's confession that she physically abused C. Smith, respondent father's failure to comprehend respondent mother's danger to C. Smith applies with equal force here.

as such, her testimony was best characterized as expert opinion. Even assuming this witness offered expert opinion, as respondent father acknowledges on appeal, the Rules of Evidence generally do not apply at a best interests hearing. MCR 3.977(H)(2). Thus, the court was not bound to disregard this witness's alleged expert testimony because she was not an expert. Regardless, even though other witnesses did not testify as the CPS worker did, stating that her fear for the children's safety was based in the children's lack of stability, the record independently supports the CPS worker's conclusion on this point, considering that CPS located the children in a hotel room wearing dirty clothing and smelling of urine. As a result, the court did not clearly err in considering this testimony.

Respondent father next claims that emphasis must be given to the current foster care worker's opinion that he could care for the children by himself and that his parenting abilities had improved. But in making this claim, respondent father ignores his own testimony that if respondents regained custody, respondent mother would care for the children while he was at work, despite his knowledge of respondent mother's mental illnesses and history of abusing the children, as well as his unfounded belief that the children would be safe in her care.[3] There was no clear error here.

Regarding the clinical psychologist, respondent father claims that her opinions related to his parental fitness (specifically with respect to finding suitable housing and his benefiting from parenting classes) were unreliable since the date of her assessment was six months before the termination order was entered. What this argument fails to acknowledge, however, is that other evidence confirmed the factual bases of the psychologist's conclusions. For example, the psychologist noted that respondent father had minimized respondent mother's own parenting difficulties. Respondent father's own testimony confirms this. Moreover, many of the psychologist's opinions were grounded in facts bearing directly on the children's safety, such as respondent father's claim of ignorance as to how some of S. Smith's injuries were caused (despite respondent mother's claim respondent father was present when they occurred) and his minimization of respondent mother's mental illnesses. Again, respondent father's plea of no contest and his testimony confirm these bases. The trial court did not clearly err in considering the opinions of the clinical psychologist.[4]

Third, respondent father claims that the children's foster care situation does not provide for their stability because it is temporary and because the children may endure some emotional problems when transitioning to adoption. But the mere possibility that the children could face some speculative transitional problems pales in comparison to the pattern of emotional and physical abuse the children may face if returned to their parents. Moreover, respondents' lease

[3] For this same reason, respondent father's compliance with the parent-agency agreement does not render the trial court's decision clearly erroneous.

[4] To the extent that respondent father attempts to impugn the current foster care worker's reliance on the clinical psychologist's opinion on this ground, the argument fails for the same reason.

agreement remains in place only as long as they continue to receive funding from the Veteran's Administration and is by no means permanent. This argument is meritless.

Finally, we reject respondent father's argument that although the children had improved in foster care, the relevant comparison is not between foster care and respondents' home, but between respondents' home and that of a prospective adoptive family. But this comparison is not what *Olive/Metts* provides. Regardless, respondent father only suggests, but does not undertake, this speculative comparison. It is not this Court's responsibility to fashion an argument on his behalf.[5] *Mudge*, 458 Mich at 105.

Affirmed.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[5] Moreover, the sheer impracticability and impossibility of evaluating the qualities associated with "some unknown adoptive family" illustrates the folly of respondent father's position.